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ILLINOIS COMMERCE COMMISSION**

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STATE OF ILLINOIS

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ILLINOIS COMMERCE COMMISSION

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21st CENTURY TELECOM OF ILLINOIS, INC.)

-VS-)

Illinois Bell Telephone Company)

d/b/a Ameritech Illinois)

Docket No. 00-0219

COMPLAINT AGAINST ILLINOIS BELL)

TELEPHONE COMPANY D/B/A)

AMERITECH ILLINOIS UNDER SECTIONS)

13-514 AND 13-515 OF THE PUBLIC)

UTILITIES ACT, AND REQUEST FOR)

EMERGENCY RELIEF PURSUANT TO)

SECTION 13-515(e))

REPLY IN SUPPORT OF REQUEST FOR EMERGENCY RELIEF

21st Century Telecom of Illinois, Inc. ("21st Century"), by its undersigned attorneys, files this reply to Ameritech's Opposition to 21st Century's request for emergency relief.

INTRODUCTION

21st Century's Complaint identifies three discrete "actions" which constitute violations of Section 13-514 of the Public Utilities Act (the "Act") (220 ILCS 5/13-514). Specifically, Ameritech fails to provision inter-office trunk facilities within the time frames and in the manner required by its interconnection agreement with 21st Century, thereby adversely affecting 21st Century's service to its customers. Ameritech also fails to timely provision unbundled loops in a non-discriminatory manner. Exacerbating the problem is Ameritech's failure to notify 21st Century electronically when it will not meet a provisioning date, which prevents 21st Century from providing service to its customers in a timely fashion. Ameritech consistently fails to meet its performance obligations to 21st Century. Finally, Ameritech has disabled certain equipment used by *Ameritech* to provision AXT service

within the buildings in which 21st Century customers reside, or disconnected service to prospective 21st Century customers, which negatively impacts 21st Century's competitiveness as to such customers.

21st Century has requested emergency relief in the form of an immediate order directing Ameritech to comply with its contractual and statutory obligations with regard to provisioning of trunk augments and unbundled loops, and with regard to service to customers who take AXT service. Emergency relief is appropriate here. 21st Century has met its burden under Section 13-515(e) of the PUA since it has made a "verified factual showing" that it will "likely succeed on the merits. will suffer irreparable harm in its ability to serve customers if emergency relief is not granted, and that the order is in the public interest." Ameritech's Opposition concedes many of the relevant facts and fails to refute the legal basis for 21st Century's request for emergency relief.'

'Ameritech disputes 21st Century's statement that its factual allegations "must be assumed to be correct for purposes of emergency relief." (Opposition, p. 4) However, Ameritech cites not a single case brought under the enforcement provisions of the Act in support of its argument. The cases cited by Ameritech are inapposite since they concern requirements for emergency relief, or a preliminary injunction, under Illinois common law, which differ from the Acts requirements for the granting of emergency relief. Under Section 13-515(e), emergency relief is appropriate where the complainant "makes a verified factual showing that the party seeking relief will likely succeed on the merits, that the party will suffer irreparable harm in its ability to serve customers if emergency relief is not granted, and that the order is in the public interest." 21st Century showed through its verified Complaint, and further shows herein, that it has met its burden and, therefore, emergency relief should be granted.

ARGUMENT

I. 21st Century Has Shown A Likelihood Of Success On The Merits.

A. Timeliness of Provisionina of Trunk Augments

Ameritech attempts to skirt the issue of its failure to timely provision trunk augments by first denying this failure, and then shifting blame to 21st Century for not identifying specific orders as to which due dates were missed. (Opposition, pp. 4-6) This strategy is legally deficient, and its argument ignores the actual facts alleged in the Complaint.

First, there is no legal requirement, *and Ameritech cites none*, for 21st Century to have detailed in its Complaint each and every due date Ameritech has missed. The only reason for 21st Century to have done so in the Complaint would have been to impress upon the Commission the sheer volume of missed due dates. It was sufficient for 21st Century to have pled that Ameritech has failed to timely provision trunk augments, and that is what is alleged in paragraphs 6 through 10 of the Complaint. However, there is no metrics test associated with a grant of emergency relief., It is not necessary, as Ameritech would have the Commission believe, for 21st Century to establish some “threshold” level of untimeliness before seeking emergency (or even permanent) relief.

Moreover, and importantly, Ameritech’s response begs the question raised by the Complaint. The prohibited action which formed the basis for this portion of the Complaint is Ameritech’s failure to timely provision trunk augments “with respect to orders that have not been rejected by Ameritech.” (Complaint, para. 7) In otherwords, 21st Century has *not* raised any issue regarding the timeliness of provisioning of facilities for orders that were *rejected* by Ameritech. Ameritech failed to address whether it has timely provisioned facilities where orders were properly submitted by 21st Century, and instead responded as

to orders that were rejected. (See Opposition, p. 5) Once Ameritech has accepted an order, it is obliged to provision trunk augments within the agreed upon time frames. Thus, contrary to Ameritech's rhetoric (Opposition, p. 5), the fault for the delays lies with Ameritech, not 21st Century.

Significantly, Ameritech actually concedes that it "experienced a temporary, unexpected problem with its TIRKS database beginning in late 1999 that may have affected 21st Century's orders" which caused it to fail to timely provision trunk augments. (Opposition, p. 5) However, since the Complaint alleges more than a historic period during which Ameritech failed to perform, but instead alleges an ongoing performance problem, Ameritech's explanation of the TIRKS problem is irrelevant. In any event, if the problem with the TIRKS database "was resolved a few weeks ago" as Ameritech contends, (Opposition, p. 6), Ameritech should be fully able to timely provision trunk augments, which is the emergency relief sought by 21st Century. Thus, no reason exists for Ameritech to take issue with a grant of emergency relief.

B. Timeliness of LOOP Provisioning

21st Century stated in its Complaint that Ameritech fails to timely provision unbundled loops, or to notify 21st Century when provisioning will not timely occur and then reschedule the installation. (Complaint, pp. 5-6) Ameritech responded that it has provided 21st Century performance reports and that those reports show that it has met the due dates on many of 21st Century's loop orders. (Opposition, p. 7) These allegations are grossly misleading and inaccurate, and fail to address the entirety of the issue.'

²Ameritech also rehashes the argument it raised with regard to trunk augments, that 21st Century has failed to identify each specific instance when a loop was not timely

21st Century has stated that Ameritech frequently misses initial Firm Order Commitment ("FOC") dates and unilaterally changes FOC dates without notifying 21st Century. Ameritech responded by claiming that it usually meets FOC dates, citing "average installation interval" statistics which are included in reports Ameritech provides to 21st Century. (Opposition, pp. 6-7) Ameritech's response begs the question. While Ameritech provides reports which indicate that it has met a certain percentage of FOC dates, the statistics in Ameritech's reports relate only to Ameritech's compliance with the *final* FOC date for a particular order, as opposed to earlier FOC dates which were missed. In other words, Ameritech's reports fail to indicate how many previous FOC dates were missed before the last FOC date was eventually met.³ (See Kitchen Affidavit) Thus, Ameritech's performance statistics are, at best, irrelevant and, at worst, misleading.⁴

Furthermore, it is wholly irrelevant that Ameritech supplies 21st Century with these self-serving, misleading reports. What is relevant is when Ameritech fulfills its loop orders, which 21st Century has alleged is often not on time, when performance is measured from Ameritech's receipt of the loop order. Ameritech often fails to timely provision loops. (See Kitchen Affidavit)

provisioned. (Opposition, p. 6) Again, Ameritech cites not a single legal authority for its claim that 21st Century was required to identify each such occurrence, or that there is some "threshold" level of violations for the conduct to amount to a violation of Section 13-514 of the Act.

³It is common for Ameritech to issue a FOC date within 48 hours of an order, fail to meet that FOC date, and subsequently issue a new FOC date. (See Kitchen Affidavit)

⁴Even were the Commission to accept Ameritech's incorrect assertions, then there would be no harm in granting the request for emergency relief, since Ameritech would need not change its conduct to comply with such an order.

Ameritech also takes issue with 21st Century's claim of discrimination in the provisioning of loops, claiming that "[r]etail services and unbundled network elements are not properly comparable as a matter of law." (Opposition, p. 7) This argument is a rehash of the argument it made in Docket 99-0525, which was roundly rejected by the Commission in its December 20, 1999 Order, in which the Commission concluded that Ameritech's provision of UNEs to competitors is appropriately compared to its provision of retail service to end use customers. (Order, Docket 99-0525, p. 17) 21st Century has alleged, and Ameritech has failed to refute with relevant facts, that Ameritech provisions service to end use customers more quickly than it provisions loops to 21st Century to serve its end use customers, which amounts to unlawful discrimination.

Finally, Ameritech asserts that the issue of its late notice of missed due dates has already been resolved in a separate agreement. (Opposition, pp. 7-8) This assertion is significant for two reasons. First, it is yet another admission by Ameritech of the conduct alleged in the Complaint, i.e., that it fails to meet its loop provisioning commitment dates. Second, after admitting wrongdoing and asserting that it took corrective measures, Ameritech should have no objection to the Commission granting emergency relief and enforcing the non-discriminatory provisioning intervals it has agreed to meet.

C. AXT Service Issues

21st Century has alleged that Ameritech has engaged in discriminatory practices with regard to 21st Century customers who **also receive** Ameritech's AXT service. Ameritech has failed to meaningfully reply to these allegations, claiming only that it is on the verge of remedying the problem. This vague commitment, like those Ameritech has provided to 21st

Century over the past several months, is simply not sufficient to remedy the discriminatory conduct.

Ameritech included four paragraphs in its discussion of the AXT issue. (See Opposition, pp. 8-9) The first paragraph merely summarizes 21st Century's claim. The second paragraph merely describes Ameritech's AXT service. In the third paragraph, Ameritech explains that, at first, it failed to understand that it could unbundle loops in order to provide service to 21st Century customers without disconnecting their AXT service, but that it now understands how to do so. Ameritech also concedes it has not yet finalized how and when it will provision loops to 21st Century customers without affecting their AXT service, although it presumably plans to do so some day.

These assertions establish two things. First, they confirm 21st Century's claim that "Ameritech has been disabling AXT service to 21st Century customers who are tenants in buildings which subscribe to Ameritech's AXT service." (Complaint, para. 19) Second, they establish that Ameritech believes it is technically feasible to provision unbundled loops without disconnecting AXT service.

The Commission should not be lulled into believing this problem has been or will soon be resolved.⁵ The glaring omission in Ameritech's lengthy, but useless, discussion of this issue is *when* it will actually provision unbundled loops to 21st Century customers without disconnecting their AXT service now that it knows that it is technologically feasible

⁵In the footnote on page 9 of its Opposition, Ameritech states its belief that a complaint would be premature because it is finally ready to work on correcting the AXT service problem with 21st Century. If Ameritech is indeed ready to correct this problem, then the emergency relief 21st Century seeks should not prove to be a problem for Ameritech.

to do so. It was Ameritech's reluctance to commit to a precise date on which it will correct the AXT problem that caused 21st Century to file this Complaint. With each day that the problem remains unresolved, 21st Century loses current customers and countless potential customers because of its inability to provide competitive services. Potential and current customers do not inquire whose fault it is that 21st Century is not meeting their demands; that Ameritech is responsible does not enter into the equation when customers decide to disconnect 21st Century service or not to connect in the first place.

Ameritech claims that its failure to provision unbundled loops without disconnecting AXT service for 21st Century customers did not constitute a "knowing impediment to competition." (Opposition, p. 9) In other words, Ameritech claims it lacked the requisite intent to impede competition because it somehow did not understand its own technology. However, Ameritech's intent to impede competition is shown when the 48-hour notice requirement in Section 13-515 is met, as it was here. 220 ILCS 5/13-515(c). Ameritech is a large and sophisticated company and cannot hide behind a veil of ignorance. It would violate both public policy and common sense to negate Ameritech's intent by ignoring the fact that it not only had the capability to figure out how to provision unbundled loops without disconnecting 21st Century customers' AXT services, but also knew that 21st Century viewed Ameritech's actions as discriminatory and anti-competitive.

Equally unpersuasive is Ameritech's claim in its fourth paragraph of cooperating in "good faith" with 21st Century to resolve this issue. (Opposition, p. 9) As stated in the Complaint, Ameritech has offered no practical or economic solution to this problem. That Ameritech is in the process of resolving 21st Century's complaints is not a basis for the Commission to fail to act, *since Ameritech has not yet resolved the problem.* (See Kitchen

Affidavit) What these facts show is that Ameritech has no real intent to finally resolve this problem and that Ameritech will not do so until it is forced to. Ameritech's dilatory conduct must cease, and the sooner, the better for the public. The Commission must not refrain from using its authority to grant emergency relief based solely on Ameritech's bald assertion that it is in the process of resolving this issue. There is no legal basis for Ameritech not to solve the problem today. The Commission must not give Ameritech the ability to delay providing relief any longer.

II. 21st Century Has Shown Irreparable Harm.

21st Century has suffered and continues to suffer irreparable harm as a result of Ameritech's practice that is the subject of this Complaint. Damages alone cannot effectively redress 21st Century's loss of customers. In many instances, 21st Century has been unable to provide its customers with services comparable to Ameritech's and has lost customers. Once a customer is lost, 21st Century's reputation is forever tarnished. Since a competitive local exchange market has not yet developed in the markets in which it offers competitive local service, this problem is all the more serious. Ameritech has a reputation based on about a century of service. 21st Century is still building its reputation, and it is suffering irreparable harm to its reputation each and every time it has to, in effect, tell a customer that the customer will be better off going to Ameritech since Ameritech can timely provide the service the customer seeks. Moreover, even were one to try to estimate damages, it is not possible to know the true number of customers 21st Century has lost and continues to lose as a result of Ameritech's practices.⁶

⁶ Ameritech's argument seeks to put 21st Century in the proverbial "Catch 22," since if 21st Century had shown a specific number of customers it had lost, Ameritech would

Furthermore, Ameritech misstates the requirements for emergency relief under Section 13-515(e) when it maintains that 21st Century “cannot demonstrate *substantial* irreparable harm.” (Opposition, p. 11)(emphasis added) Section 13-515(e) requires only a showing that the party seeking emergency relief “will suffer irreparable harm in its ability to serve customers if relief is not granted.” Ameritech’s insertion of the word “substantial” is an inappropriate attempt to raise the bar for the grant of emergency relief. It matters not that Ameritech perceives the harm 21st Century has suffered to be insubstantial; what matters is that such harm is irreparable. The loss of untold potential customers and customer referrals, is irreparable damage to 21st Century.

Section 13-515(e) includes a provision for emergency relief to prevent this type of competitive harm. Emergency relief is appropriate in this case.

III. **Granting Emergency Relief Would Serve The Public Interest.**

Granting emergency relief would be in the public interest. Requiring Ameritech to uphold its contractual obligations, thereby permitting 21st Century to compete on equal footing with Ameritech will enhance local competition, a result which will benefit the public. This is the paramount goal of the Telecommunications Act of 1996. Ameritech consistently thwarts that goal by failing to live up to its obligations to 21st Century, thus causing 21st Century to fail to live up to its obligations to its customers.

Ameritech’s concern (p. 12) that the Commission’s grant of emergency relief would “open the floodgates to more and more overgeneralized complaints” is specious and belies Ameritech’s true concern: that it will no longer be able to resist competition. Effective

likely have contended that damages could have been calculated and therefore there is no irreparable harm.

competition is the last thing Ameritech wants, for without competition, Ameritech's monopoly is unshakable. Enabling competition in the local service market would be to Ameritech's detriment, yet increased competition is in the public interest. 21st Century's Complaint must be judged on its own merits, not based on some yet to be filed complaint.

Finally, Ameritech attempts to obfuscate the AXT issue by characterizing it as a merely "obscure service," presumably one which is too small for the Commission to address. (Opposition, p. 11) The AXT service, however, is certainly not obscure to those high-rise tenants who cannot otherwise answer their doorbells without trekking to the lobby. The public interest, as articulated by the Telecommunications Act of 1996, will be met only if Ameritech is forced to honor its obligations and assist its competitors in providing equal services. Thus, granting emergency relief can do nothing but serve the public interest.

IV. 21st Century's Claims Regarding Provisioning of Trunk Augments and Unbundled Loops Are Cognizable Under Section 13-515.

Citing only a portion of 13-515(b) that serves its purpose, Ameritech claims that the trunk augment and loop provisioning claims may not be heard in this Section 13-515 enforcement action since they involve violations of the interconnection agreement. (Opposition, pp. 12-13) In its entirety, however, 13-515(b) reads as follows:

The provisions of this Section shall not apply to an allegation of a violation of item (8) of Section 13-514 by a Bell operating company, as defined in Section 3 of the federal Telecommunications Act of 1996, unless and until such company or its affiliate is authorized to provide inter-LATA services under Section 271(d) of the federal Telecommunications Act of 1996; *provided*, however, that a complaint setting forth a separate independent basis for a violation of section 13-514 may proceed under this Section notwithstanding that the alleged acts or omissions may also constitute a violation of item (8) of Section 13-514. 220 ILCS 5/13-515 (emphasis added).

21st Century has alleged that Ameritech's untimely provisioning of trunk augments and loops violates not only its interconnection agreement with 21st Century, but also 'impedes 21st Century's ability to compete. (See Complaint, para. 8, 13) In addition, 21st Century has stated that these failures amount to discriminatory conduct, since Ameritech timely provisions trunk augments and loops that are needed to serve its own retail customers. (See Complaint, para. 9, 14) Thus, it is clear that the Complaint alleges that Ameritech's actions are a violation of not just the interconnection agreement, but also Section 13-514(6) of the Act, which provides that a telecommunications carrier may not knowingly impede competition by "unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers."

What Ameritech is contending is that if a claim relates to an interconnection agreement obligation, it may not proceed under Section 13-515. This argument cannot be accepted, since it would essentially negate the language which was added by the General Assembly in 1998 *which allows enforcement actions to proceed under Section 13-515 even if they involve violations of an interconnection agreement.*⁷ Ameritech's argument must be rejected.

⁷Not every claim relating to a violation of an interconnection agreement may proceed under Section 13-515 of the Act. For example, claims related to disputed amounts may not implicate a prohibited action in Section' 13-514. However, as long as a complainant can show a separate basis for proceeding under Section 13-515 -- as 21st Century has done here -- the complaint may proceed under Section 13-515.

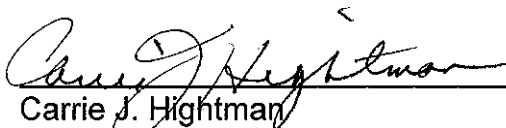
CONCLUSION

The Commission must reject Ameritech's opposition and grant 21st Century's request for emergency relief. Ameritech provisions facilities to 21st Century only when it suits Ameritech. Ameritech's caprice in this regard has irreparably harmed 21st Century by hampering 21st Century's ability to attract and retain customers. 21st Century is currently forced to attempt to offer services to customers without knowing if it will be able to do so because of Ameritech's repeated failure to provide facilities and because of the manner in which it provisions facilities to AXT customers. For the reasons described herein and in the Complaint, the Commission must grant emergency relief in order to halt the harm both to competition and to 21st Century.

Dated: March 13, 2000

Respectfully submitted,

21st CENTURY TELECOM OF ILLINOIS, INC.



Carrie J. Hightman
Samantha H. Horwitz
SCHIFF HARDIN & WAITE
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5657

Counsel for
21st CENTURY TELECOM OF ILLINOIS, INC.

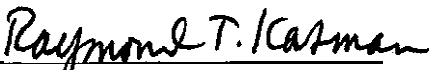
COUNTY OF COOK)
) SS
STATE OF ILLINOIS)

VERIFICATION

I, Howard Kitchen, Vice President-Telephony for 21st Century Telecom of Illinois, Inc., being first duly sworn, verify that the statements contained in the foregoing are true and correct to the best of my information, knowledge, and belief.


Howard Kitchen Vice President

Subscribed and sworn to
before me this 13th day
of March, 2000.


Notary Public



STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

21st CENTURY TELECOM OF ILLINOIS, INC.)

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AFFIDAVIT OF HOWARD J. KITCHEN

Howard J. Kitchen, under penalty of perjury, states as follows:

1. I am Vice President - Telephony at 21st Century Telecom of Illinois, Inc., Complainant in this proceeding. I am responsible for telephone service implementation, and the processes and procedures related thereto. I am personally familiar with the incidents which gave rise to the Complaint which initiated this proceeding, and have participated in discussions with Ameritech related to these issues.

2. Ameritech's failure to meet loop provisioning dates is an ongoing problem.

3. On Thursday, March 9, 2000, 40 loops were scheduled to be installed by Ameritech. Installation of seven of those loops was delayed and did not occur as scheduled, Ameritech provided no revised commitment date as to when those delayed orders would be met.

4. On Thursday, March 9, 2000, one of the 40 loops that was scheduled to be

installed was canceled as a result of the customer taking AXT service.

5. On Friday, March 10, 2000, 49 loops were scheduled to be installed by Ameritech. Ten of those orders were delayed and loop installation did not occur as scheduled.

6. Of the loops installed on Friday, March 10, 2000, two were scheduled to be installed on Monday, March 6, 2000, and five were scheduled to be installed on Thursday, March 9, 2000.

7. Further Affiant sayeth not.


Howard J. Kitchen

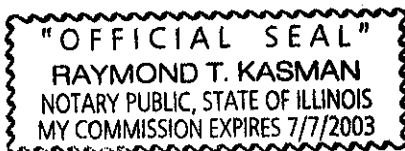
CERTIFICATION

Under penalties as provided by law pursuant to Section I-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.


Howard J. Kitchen

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3/13/2000 Raymond T. Kasman



CERTIFICATE OF SERVICE

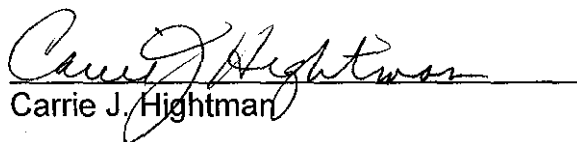
The undersigned attorney for 21st Century Telecom of Illinois, Inc. hereby certifies that she caused copies of the attached 21st Century Telecom of Illinois, Inc.'s Reply In Support Of Request For Emergency Relief to be served on the persons listed below electronically on March 13, 2000 and in the manner indicated on March 14, 2000:

Mark Kerber
Illinois Bell Telephone Company d/b/a
Ameritech Illinois
225 W. Randolph Street
Suite 27B
Chicago, IL 60606
[VIA MESSENGER]

Christian F. Binnig
J. Tyson Covey
Kara K. Gibney
Mayer, Brown & Platt
190 S. La Salle Street
Chicago, IL 60603
[VIA MESSENGER]

G. Darrell Reed
Illinois Commerce Commission
160 N. LaSalle Street
Suite C-800
Chicago, IL 60601
[VIA MESSENGER]

Eve Moran
Hearing Examiner
Illinois Commerce Commission
160 N. LaSalle Street
Suite C-800
Chicago, IL 60601
[VIA MESSENGER]


Carrie J. Hightman

Attorney for
21st CENTURY TELECOM OF
ILLINOIS, INC.